SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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INDEX NO. 155622/2013

LUSIA REINOSO,

MOTION SEQ. NO. 2

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY, INC., MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, LUIS PENA, DANIEL LUGO

DECISION AND ORDER

Defendant.

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PAUL A. GOETZ, J.:

Defendants, the New York Transit Authority, the Metropolitan Transportation Authority, MTA Bus Company, Inc., Manhattan and Bronx Surface Transit Operating Authority and Daniel Lugo move post-trial pursuant to CPLR§ 4404 to set aside the jury's verdict as to liability and damages and enter judgment in favor of defendants, or in the alternative, order a new trial on the grounds that the verdict was contrary to the weight of the evidence; and for a collateral source hearing pursuant to CPLR § 4545 (a). Plaintiff, Lucia Reinoso, cross-moves to set aside the jury verdict only as to future pain and suffering claiming the award is inconsistent with the other categories of the jury's award and is a material deviation from reasonable compensation for plaintiff's injuries; and for an additur.

After a ten-day trial, the jury found defendants 100% liable and returned a verdict in favor of plaintiff totaling $10,500,000. The jury's verdict is comprised of the following: Up to the date of the verdict; $121,000 for loss of earnings, and $5,000,000 for pain and suffering; from the date of the verdict to be incurred in the future; $5,000,000 for medical expenses, $60,000 for loss of earnings, and $319,000 for pain and suffering.

Evidence at trial

Plaintiff sustained personal injuries as a result of an accident that occurred while she was disembarking from a New York City Transit Authority ("NYCTA") bus on February 12, 2013. Plaintiff, a home health aide, testified that she was exiting the bus down the wheelchair ramp/platform behind her patient who was in a motorized wheelchair when the bus operator activated the ramp/platform without warning, causing it to lift back into the bus and propelling plaintiff onto the side walk where she landed on her left side (Tr 263).

Bus operator Daniel Lugo testified that on the date of the accident, he parked his bus parallel to the bus stop at plaintiff's stop, deployed the ramp/platform, walked to the motorized wheelchair to release the securing straps, observed plaintiff's patient exit the bus, stored the securing straps, and returned to his seat when he heard someone shout that a passenger had fallen. Lugo then observed through his mirror plaintiff on the sidewalk. He believes that he then walked off the ramp to aid plaintiff (Tr 228 – 232).

After the accident, plaintiff accompanied her patient to his doctor's appointment and then proceeded to New York-Presbyterian hospital where she complained of pain to her neck, right wrist and hand, left shoulder/elbow, left hip and knee. Plaintiff was instructed by the hospital to follow-up with her primary care physician (Tr 271 – 275).

After consulting with her primary care physician, plaintiff treated with three orthopedic surgeons two of whom testified at trial, Dr. Gabriel Dassa and Dr. Andrew Merola. Plaintiff also received treatment from two pain management doctors at Comprehensive Pain Management one of whom testified at trial, Dr. Chaim Mandelbaum. No independent medical examining doctors testified on behalf of defendants at trial.

Dr. Dassa

Dr. Gabriel Dassa testified that because of the accident, plaintiff suffered injuries to her neck, back, left shoulder, left knee and left hip (Tr 382, 451 – 455). Dr. Dassa primarily treated plaintiff's injuries to her left knee and left shoulder. As to plaintiff's left knee, Dr. Dassa testified that plaintiff sustained an internal fracture of the lateral tibial plateau and a resulting bone contusion, and a mass serration and tearing of her medial meniscus (Tr. 397, 404). In June, 2013, Dr. Dassa performed arthroscopic surgery on plaintiff's left knee and during the surgery he observed "tricompartment synovitis with traumatic arthropathy' and "extensive chondral injury to distal femur and at the trochlea as well as the medial femoral condyle" (Ex 8). Dr. Dassa explained that because the damage to plaintiff's meniscus was so extensive, to repair plaintiff's left knee, he had to shave and grind the bone surface. Because of the trauma to plaintiff's left knee there was a lot of scar tissue that Dr. Dassa had to remove surgically (407 – 409). After the surgery on her left knee, plaintiff received injections of lubricating gel but over time her condition did not improve so Dr. Dassa recommended knee replacement surgery. In October, 2016, plaintiff underwent left knee replacement surgery performed by Dr. Sanjit Konda. Dr. Dassa explained that during the knee replacement surgery, saws were used to cut off the ends of the arthritic parts of the bone and the undersurface of the kneecap and then metal parts were cemented to the bone with bone cement. (Ex 13, Tr 429 – 430).

Regarding plaintiff's left shoulder injury, Dr. Dassa diagnosed plaintiff with a torn rotator cuff, three labrum tears, a tear of the bicep anchor and post-traumatic impingement syndrome. In May, 2014, Dr. Dassa performed arthroscopic surgery on plaintiff's left shoulder (Ex 8, Tr 421 – 426).

Concerning plaintiff's left hip injury, Dr. Dassa testified that an MRI report from March, 2013, revealed that plaintiff had a partial tear to her gluteus-medius muscle as well as trochanteric bursitis. In October, 2015 Dr. Dassa recommended another MRI of plaintiff's left hip because she continued to experience pain. The later MRI revealed that the partial tear had progressed into a full-thickness tear and she had developed traumatic arthritis in her left hip. Dr. Dassa opined that plaintiff will require hip replacement surgery (Tr 445 – 447).

Dr. Merola

Dr. Merola treated plaintiff's injuries to her spine. As to plaintiff's cervical spine, Dr. Merola testified that because of the accident, plaintiff suffered a disc herniation at C5-C6 resulting in approximately a 70% loss in her range of motion (Tr 74). In May, 2016, Dr. Merola performed an anterior cervical discectomy and fusion on plaintiff (Ex 17). During the surgery Dr. Merola removed the C5-C6 disc, replacing it with a carbon fiber device called a cage. The cage was attached to plaintiff with a plate and two screws which were secured by rods. In total, Dr. Merola placed six screws in three bones with two rods. Dr. Merola averred that the screws and rods in plaintiff's neck will never be removed (Tr 87 – 89).

Regarding plaintiff's lumbar spine, Dr. Merola testified that because of the accident, plaintiff suffered disc herniations at L3, L4 and L5 resulting in severe lumbosacral radiculopathy. In March, 2015 Dr. Merola performed a surgery on plaintiff's lumbar spine, consisting of a lumbar laminectomy, discectomy and fusion (Ex 17, Tr 78 & 80 – 83).

Dr. Mandelbaum

One of plaintiff's pain management doctors, Dr. Chaim Mandelbaum, testified about the pain management procedures plaintiff underwent, including the following: 1) facet or dorsal media nerve block injections to her lower back; 2) radiofrequency cervical facet ablation to her

neck, a procedure whereby a needle tip was heated to 80 degrees Celsius and inserted into plaintiff's neck in order to destroy the nerve; 3) lumbar transforaminal injections, a steroid medication injected at the nerve exit; 4) trigger point injections, a muscle relaxant injected into the muscle to ease severe spasming; and 5) left hip intraarticular bursa injection of steroid medication. (Ex 31, Tr 530 539).

Dr. Mandelbaum also testified about the pain management treatment plaintiff will require in the future including the following: 1) trigger point injections every three month for the duration of plaintiff's life; 2) radiofrequency lumbar facet ablation once every two years for the duration of plaintiff's life; 3) radiofrequency cervical facet ablation once every two years; 4) joint lubrication injections (three in a series) once a year for the duration of plaintiff's life; 5) left hip steroid injections once a year for the duration of plaintiff's life; 6) neck myobloc injections once a year for the duration of plaintiff's life; 7) greater occipital nerve block injections every six months for the duration of plaintiff's life; 8) lumbar transforaminal steroid injections every two years for the duration of plaintiff's life; 9) left hip total joint arthroplasty (was scheduled at the time of trial for January, 2019); 10) physical therapy (twice a week for six months, then twice a month for eighteen months, then an average of ten session per year) for the duration of plaintiff's life. Another treatment plaintiff will require according to Dr. Mandelbaum is implantation of a trial lumbar spinal cord stimulator and if effective, implantation of a permanent lumbar spinal cord stimulator. Dr. Mandelbaum further opined that plaintiff would be on an array of medications for the duration of her life, including, anti-inflammatories, muscle relaxants, neuropathic pain medications, headache medications, topical pain medications, and medications for gastrointestinal side effect of the pain medications (Ex 31A, Tr 543 – 563).

Discussion

Liability

To support their argument that the jury's verdict on liability should be set aside, defendants argue that Lugo did not testify that the ramp/platform was improperly used and (without citation to the record) he could not have activated the ramp because he was storing the securing straps and not near the operating mechanism at the time of the accident. Lugo's trip sheet, according to defendants, also supports their version of what transpired on February 12, 2013, because it does not mention improper use of the ramp/platform nor does any other NYCTA record. Plaintiff's version of the accident, according to defendants is mere speculation because the hospital intake record states that plaintiff told hospital staff that the bus operator "apparently inadvertently" lifted the ramp/platform (O'Brien affm pg 4).

Plaintiff opposes, arguing that the jury's verdict on liability was supported by the evidence. Plaintiff cites to her testimony at trial and argues that documentary evidence shows that she repeatedly told her doctors she was injured when the bus operator lifted the ramp/platform while she was getting off the bus. Plaintiff notes that conflicting versions of events are to be resolved by the jury, not the court and the jury accepted plaintiff's version of events. (Norinsberg affm pgs 10 – 12).

Defendants have a heavy burden in seeking the jury verdict set aside and judgment entered in their favor (*Matter of NYC Asbestos Lit.*, 148 AD3d 233, 250 [1st Dept 2017] [Feinman, J. dissenting]; *affm* 32 NY3d 1116 [2018]). The jury's verdict is accorded considerable deference and "should not be set aside unless it could not have been reached by any fair interpretation of the evidence" (*Nakasato v 331 W 51st Corp.*, 124 AD3d 522, 523 [1st Dept 2015]). The court must view the evidence in a light more favorable to plaintiff (*Matter of NYC*

Asbestos Lit., 148 AD3d at 250 [Feinman, J. dissenting]). In short, the verdict may only be set aside when it is "utterly irrational" (*Id.*).

Plaintiff's testimony as to the cause of her fall on February 12, 2013, - the bus operator activated the ramp/platform - provides a rational basis for the jury's liability determination and nothing in the record presents grounds for disturbing the jury's determination that plaintiff's version of events was more credible than Lugo's (*Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471, 477 [1st Dept 2011]). Accordingly, after affording the jury's liability determination considerable deference and when viewing the evidence in a light more favorable to plaintiff, defendants' motion to set aside the jury's verdict on liability and enter judgment in favor of defendants must be denied.

Damages

Defendants, while acknowledging that the amount of damages awarded is primarily a question for the jury to resolve, seek to set aside the jury's damages award claiming it is excessive and that it materially deviates from what would be reasonable compensation. Defendants' arguments are limited to the jury's award for pain and suffering; no argument is presented addressing the jury's awards for lost wages and medical expenses, including custodial care and rehabilitation services.

CPLR § 4404 (a) authorizes a trial court, "on motion of the parties or on its own motion, to review the question of whether the jury's verdict on the issue of damages was against the weight of the evidence and to set it aside if it finds that the verdict deviated materially from what would be reasonable compensation" (*Bock v City of Mount Vernon,* 123 AD3d 644, 646 [2nd Dept 2014] [citations and brackets omitted]; *cf Ramos v New* York, 169 AD2d 687 [1st Dept 1991] [holding trial court properly determined the damages awarded "deviated materially from

what would be reasonable compensation]; *accord Thompson v Toscano*, 166 AD3d 446, 447 [1st Dept 2018] [affirming trial court's order directing a new trial unless parties stipulate to a reduced award and noting favorably trial court's review of cases with comparable injuries and awards and that amount determined by the trial court "constituted reasonable compensation for the injuries sustained"] *Morales v Manh. & Bx. Surface Tr. Operating Auth.*, 106 AD3d 459 [1st Dept 2013] [modifying trial court's order directing a new trial unless parties stipulate to a reduced award so as to increase the future pain and suffering award, and holding that amount awarded by the jury deviated materially from what is reasonable compensation]). When exercising discretion over damage awards, courts should do so sparingly (Shurgan *v Tedesco*, 179 AD2d 805, 806 [2nd Dept 1992]); trial courts lack the authority to substitute their determination as to what is an appropriate award for that of the jury (*Ashton v Bobruitsky*, 214 AD2d 630, 631 – 632 [2nd Dept 1995]). Instead, the proper procedure to be used when a trial court determines that the damages awarded by the jury is against the weight of the evidence, is to grant a new trial on the issue of damages unless the parties stipulate to an adjustment in the jury's award (*id.; Bock*, 123AD3d at 646).

In support of their argument that the jury's award of damages for pain and suffering is excessive, defendants cite to cases that award damages for individual injuries similar to plaintiff's injuries but not to any case that involved the same combination of injuries sustained by plaintiff because as they concede "[t]here appear to be no cases that exactly encompass Plaintiff Lucia Reinoso myriad injuries and surgeries" (O'Brien affm pg 5). Therefore, it is necessary to survey cases of appellate authority where Courts considered the material deviation issue as to injuries similar to each of the individual injuries sustained by plaintiff.

For example, in *Stewart v NYCTA*, the "plaintiff sustained a contusion of the cervical spine and required a laminectomy and fusion of vertebrae, with insertion of metal plates and

screws. [The] [p]laintiff also suffered compression fractures of his thoracic spine, and later required a lumbar laminectomy with fusion and insertion of metal screws and struts." (82 AD3d 438, 440 [1st Dept 2011]). The plaintiff also had a pump surgically implanted to administer anti spasming medication to his legs (id.) Noting that the plaintiff could no longer perform many of his daily activities, the First Department held that the jury's award of 2 million dollars for past pain and suffering and 2.7 million dollars for future pain and suffering did not "materially deviate from what would be reasonable compensation" (*id.* at 440 - 441).

In *Thompson v Toscano*, the plaintiff suffered a partial labral tear to her left shoulder for which she underwent surgery and two courses of physical therapy (166 AD3d at 447). The plaintiff continued to experience intermittent pain and had a loss of range of motion in her left arm and future physical therapy and surgery might be required (*id.*). The First Department found that a jury award of $300,000 for past pain and suffering and $250,000 for future pain and suffering was reasonable compensation for the plaintiff's injury (*id.*).

The plaintiff in *Diaz v NYC*, injured his knee for which he required four arthroscopic surgeries and would likely require not only a knee replacement but also revision surgery on the knee replacement (80 AD3d 425 [2011]). The First Department held that $800,000 was reasonable compensation for 6 years of past pain and suffering and $600,000 was reasonable compensation for future pain and suffering over 31 years (*id.*; *but cf Smith v Manh. & Bx. Surface Tr. Operating Auth.*, 58 AD3d 552 [1st Dept 2009] [$100,000 for past pain and suffering and $800,000 for future pain and suffering does not deviate materially from what would be reasonable compensation where plaintiff sustained knee injury requiring arthroscopic surgery with another recommended and may require a future knee replacement]).

Finally, in *Iovine v NYC*, the plaintiff suffered permanent injuries to his hip and underwent hip replacement surgery (286 AD2d 372 [2nd Dept 2001]). After noting that the plaintiff spent several weeks in the hospital and a rehabilitation clinic and suffered from sever depression the Second Department held that the jury's past and future pain and suffering awards were inadequate and ordered a new trial unless the parties agreed to increase the plaintiff's past pain and suffering award to $100,000 and his future pain and suffering award to $250,000 (*id.*; *but cf Kirby v Turner Constr. Co.*, 286 AD2d 618 [1st Dept 2001] [total award of 2 million does not deviate materially from what would be reasonable compensation for the plaintiff's hip and spine injuries requiring future spinal fusion and hip replacement surgeries]).

Considering the injuries sustained by plaintiff to her neck, back, left shoulder, left knee and left hip and the resulting disability and suffering she will continue to endure and considering the cases above where the plaintiffs suffered individual injuries similar to plaintiff's separate, individual injuries, the amount awarded to plaintiff by the jury for past and future pain and suffering is against the weight of the evidence and deviates materially from what would be reasonable compensation. Reasonable compensation considering plaintiff's injuries would be $2.7 million for past pain and suffering and $1.4 million for future pain and suffering.

Defendants further argue that the damages award for pain and suffering should be vacated because there are inconsistencies in plaintiff's medical records concerning which side of her body she injured. Defendants note that plaintiff complained to the emergency room on the day of the accident and to Dr. Dassa on March 1, 2013, about pain on her left side but that Dr. Dassa during his examination of plaintiff on March 1, 2013 (Ex 8) found that plaintiff had a positive straight leg test and Spurling test on the right side (O'Brien affm pg 8). Defendants, however, misread Dr. Dassa's March 1, 2013, report because a positive straight leg test and

Spurling test on the right side does not mean that plaintiff injured her right side but rather as to the positive straight leg test that plaintiff injured her lumbar spine and as to the positive Spurling test that plaintiff injured her cervical spine (Ex 8).

Additional inconsistencies in the medical evidence, according to defendants, is between an NCV/EMG study dated May 15, 2013, and Dr. Merola's testimony, and plaintiff's original complaints of pain on the left side of her body and Dr. Mendelbaum's testimony. But defendants do not support these purported inconsistencies with any citations to the record or to specific exhibits, therefore, they will not be considered.

Accordingly, defendants' motion and plaintiff's cross-motion must be granted and a new trial directed on the issue of past and future pain and suffering unless the parties stipulate to reducing the verdict as to past pain and suffering from the sum of $5 million to the sum of $2.7 million and increasing the verdict as to future pain and suffering from the sum of $319,000 to the sum of $1.4 million and to entry of an amended judgment in accordance with these amounts.

Collateral source hearing

Citing CPLR § 4545, defendants argue they are entitled to a collateral source hearing on the issue of whether any part of plaintiff's future medical expenses will be defrayed from other sources. However, defendants have not met their burden of establishing by clear and convincing evidence that they are entitled to an offset hearing pursuant to CPLR § 4545 (*Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549 [1st Dept 2011]) because they have failed to submit competent evidence that plaintiff's economic losses may be replaced or indemnified from collateral sources (*Firmes v Chase Manh. Auto. Fin. Corp.*, 50 AD3d 18, 36 [2nd Dept], *app denied* 11 NY3d 705 [2008]; *see also Kroman v 2265 Davidson Rlty. LLC*, 169 AD3d 539, 541 [1st Dept 2019] [holding defendants failed to show plaintiff might receive future collateral benefits through

health insurance]). Defendants assert that they reserve their right to discovery regarding collateral sources but they have no right to reserve since the time for disclosure from plaintiff pertaining to possible collateral sources is before the note of issue was filed, during pretrial disclosure, not after a jury has rendered its verdict (*Stolowski*, 89 AD3d at 549). Therefore, defendant's application for a collateral source hearing must be denied.

Accordingly, based on the foregoing it is hereby

ORDERED that defendants' motion to set aside the jury's verdict as to liability is DENIED; and it is further

ORDERED that defendants' motion for a new trial on the issue of damages and plaintiff's cross-motion to set aside the jury's verdict only as to future pain and suffering are GRANTED and the issue of damages for past and future pain and suffering shall be retired unless the parties stipulate to reducing the verdict as to past pain and suffering from the sum of $5 million to the sum of $2.7 million and increasing the verdict as to future pain and suffering from the sum of $319,000 to the sum of $1.4 million and to entry of an amended judgment in accordance with these amounts; and it is further

ORDERED that defendants' motion for a collateral source hearing is DENIED.

Dated: June 11, 2019

New York, NY

ENTER:

J.S.C.

Hon. Paul A. Goetz, JSC